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Supreme Court of the United States

OCTOBER TERM, 1959

No. 246

GEORGE LATUS,

Petitioner,

against

UNITED STATES OF AMERICA, and
TODD SHIPYARDS CORP.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1959

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GEORGE LATUS,

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UNITED STATES OF AMERICA, and TODD SHIPYARDS CORP.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner, George Latus, prays that a writ of certiorari issue to review the judgment in admiralty of the United States Court of Appeals for the Second Circuit in the above entitled matter. The judgment of the Court of Appeals, which was entered on April 11th, 1960 (Petition for rehearing denied by order dated May 2, 1960) affirmed a decree of the United States District Court for the Eastern District of New York, dismissing the libel and the petition of the United States of America impleading Todd Shipyards Corp.

The Opinions of the Courts Below

The opinion of the District Court for The Eastern District of New York dismissing the libel is reported at 170 Fed. Supp. 837.

The opinion of the United States Court of Appeals for the Second Circuit is reported at 277 Fed. 2d 265, and is printed in the appendix hereto (A. 19-23).

The judgment of the Court of Appeals is printed in the appendix hereto (A. 24).

The order denying rehearing is printed in the appendix hereto (A. 25).

Jurisdiction

The decision and judgment of the Court of Appeals for the Second Circuit, sought to be reviewed, were entered on April 11th, 1960.

Petitioner filed a timely petition for rehearing, which was denied on May 2, 1960, without opinion.

Jurisdiction of this Court is found in 28 U. S. Code Sections 1254 (1); 2101 (c) as well as Rule 19b of the Rules of this Court under this Court's power of supervision over the judiciary system of the Federal Courts.

Questions Presented

1. Is a vessel liable *in rem* for injuries resulting from negligent maintenance of the vessel by those to whom the "control" of the vessel has been surrendered by the owner?

2. May a vessel escape liability *in rem* for injuries resulting from failure of maintenance in a reasonably fit condition for the purposes for which it is to be used because the owner has surrendered "control" to anyone, more particularly, a repair contractor?

3. Is the liability of a vessel *in rem* any less certain in a case where negligence of a repair contractor, to whom "control" of the entire vessel has been entrusted, has

created a dangerous trap, unrelated to the making of repairs, than in those cases where there is no fault but there is a warranty of seaworthiness in favor of the injured person?

4. May the United States avoid liability under a libel in admiralty, brought on *in rem* principles, for injuries sustained by a shore-based employee of the repair contractor by a finding that the dangerous, concealed condition which caused the injury was negligently created by other employees of the contractor, in the maintenance of the vessel when the condition was unrelated to the repairs being made or the condition of the vessel when the repair work started?

5. Is a Court of Appeals precluded from reversing a finding of the trial Court that "control of the vessel had been surrendered" to the repair contractor, when there is not an iota of proof to that effect as of the date of the accident and all of the evidence, which was given by respondent's employees and uncontradicted, is to the contrary?

6. Is there a duty running from the vessel and her owner to furnish a shore-based worker with a vessel which is and is maintained in a reasonably fit condition for the purposes for which the vessel is to be used even though that purpose is the making of extensive reactivation repairs? In other words does the known necessity for extensive repairs negative the existence of a general warranty of seaworthiness in other respects?

Statutes Involved

The Suits in Admiralty Act, Title 46 U. S. C. Sec. 741, *et seq.*, particularly Sec. 743, reads as follows:

> 743 PROCEDURE IN CASES OF LIBEL IN PERSONAM. Such suits shall proceed and shall be heard and determined according to the principles of law and to the

rules of practice obtaining in like cases between private parties. A decree against the United States or such corporation may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 percentum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the Court. Decrees shall be subject to appeal and revision as now (on Mar. 9, 1920) provided in other cases of admiralty and maritime jurisdiction. If the libelant so elects in his libel, the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election to so proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit. Neither the United States nor such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder.

Statement of the Case

A libel was duly filed by George Latus against the United States of America, under the Suits in Admiralty Act, in the District Court For the Eastern District of New York, alleging residence in that district and electing to sue on the basis of *in rem* as well as *in personam* liability (4a). Thereafter the United States of America filed a petition impleading Todd Shipyards Corp. and alleging an express contract of indemnity (4a).

The trial court heard evidence only on the question of liability, reserving the taking of proof on the question of damages sustained until after its decision on the question of liability (69a). It rendered an opinion including findings of fact and conclusions of law and dismissed the libel, so no proof has been taken of the damages (15a).

The libelant sustained personal injuries on the evening of November 23rd, 1951 while aboard the respondent's vessel the SS ROBERT FULTON, as a painter employed by the respondent-impleaded (hereinafter referred to as Todd). He was a member of Todd's night-shift gang which was painting the vessel. His injuries were sustained when he attempted to walk across the forward No. 1 hatch. The Court found that the hatch was covered by a tarpaulin under which there was an opening from which one or more hatch boards, each measuring four by six feet, were missing. The libelant stepped on the tarpaulin at such open spot and fell down the hatch (7a)*.

On September 5th, 1947 the SS ROBERT FULTON, an ocean-going vessel, was deactivated in accordance with the standard deactivation regulations prescribed by the Maritime Administration. This was accomplished at a Baltimore shipyard, preparatory to the vessel's being laid up in the James River "moth ball" fleet. All deck gear, including heavy lift booms, was dismantled and stowed in various holds; the ventilators in the mast-house and those running down to the fire room and the engine room were removed and similarly stowed (7a); the lifeboats were removed from their davits and similarly stowed; the steering gear was dismantled and the rudder put amidships and lashed; all the lines except tow lines were removed and sent ashore; the compass, sextant and other navigation equipment were boxed and sent to the Maritime Administration; the heads of the main engine and of all the pumps were removed; the engine room boilers were drained; all the piping was drained and the pipes were disconnected. The vessel was then towed to Norfolk, Virginia and laid up in the James River "moth ball" fleet.

She remained in the "moth ball" fleet until October, 1951 when the respondent decided to reactivate the vessel

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* References in this statement are to pages of the appendix to libelant's brief submitted to the Court of Appeals, unless otherwise stated.

She was towed to Todd's yard, leaving the James River on October 19th, 1951, and arriving at Todd on October 23rd, 1951. When the vessel arrived at Todd all of her hatches were closed and covered with tarpaulins and an outer covering of tar paper. There the vessel was placed in dry dock and surveyed. Todd proceeded to reactivate the vessel under Government job orders (8a).

The testimony of respondent's witnesses is in part:

In October, 1951 Pope & Talbot, Inc. was employed by the United States to reactivate the SS ROBERT FULTON under a general agency agreement and to operate her after reactivation. William Truman Partridge, employed by Pope & Talbot, Inc., was in complete charge of the reactivation of the SS ROBERT FULTON (46a). From the beginning of the work Mr. Partridge had assisting him, a master, first mate, chief engineer and first assistant engineer (48a). On the 23rd of November, 1951 there were aboard the vessel, in the employ of Pope & Talbot, Inc. two of Mr. Partridge's assistants, Mr. Sera and Mr. Moran, as well as all department heads, three firemen and one oiler, a total of 16 men (59a) (Ex. 4, p. 70a). On that day there were some sixty men who came aboard bringing aboard stores, ship supplies for the steward's department, the deck department and the engine room department (33a). A number of these men working under direction of the first officer, on that date, took the ship's non-perishable supplies down to the lower deck and various other parts of the ship (33a). On that same day a third gang working under his orders was placing the heavy supplies on the forward deck (33a, 34a). There was a gangway watch employed by the owner (59a, 60a). The hospital was open (34a). There was steam up at the time of the accident, the engines being operated by Pope & Talbot, Inc., employees (43a, 54a, 55a, 56a). On Monday, November 26th, 1951 some men who subsequently signed articles came aboard the vessel and others on the 27th (39a, 58a). The articles were signed on the 27th by these men. The ship

was under orders to sail as soon as the crew was aboard. She sailed on the 28th or 29th of November, 1951 (44a).

On November 1st, 1951, Frank Marshal was employed as chief officer, to take care of reactivation and to sail with the vessel. When anyone went into the hold, for inspection, the chief officer went with them. During the last four or five days of the reactivation there were closures in various areas of the ship and then that area was closed off and sealed and left ready to go to sea (52a). It was within the province of the master and chief mate, at the time of the accident, to see that the hatches were covered (67a). One specification of the contract was for the hatches to be opened up for examination and then closed up in good order after examination (50a). On November 6th, 1951 "Walter Kittey" men who take care of fire extinguishers were in No. 1 hold where the accident occurred, the chief mate being down in the hold with them (30a, 31a). On November 23rd, 1951 the only work unfinished was inspection of the gear and booms by American Bureau of Shipping Men and by the Coast Guard inspectors, each requiring the presence of the Chief Mate and the Port Captain (35a, 37a). Also the lifeboats were to be equipped by the crew (36a, 37a). The inspection of the booms started on the 23rd day of November and all inspections were finally finished on the 27th day of November 1951 (36a). On Saturday and Sunday, November 24th & 25th no work (66a) was performed. On the 27th of November the inspection of the bilges by the Coast Guard was completed after the crew had signed on and the hatches were handled by the crew under the direction of the first mate (38a).

The Court of Appeals for the Second Circuit, on April 11, 1960 rendered its opinion affirming the decree of the District Court. It held, in part:

1. That this Court authoritatively settled, by its decision in *West* v. *United States*, 361 U. S. 118, that, while

a ship is being reconditioned there is no warranty of seaworthiness running to those aboard making the repairs.

2. A warranty of seaworthiness has never been divided into fragments; a ship is either fitted for her duties in all respects or she is not fitted at all.

3. A warranty of seaworthiness has always retained the elements of its origin—an absolute duty imposed, regardless of fault.

4. That, although a shipowner in possession owes the personal duty of reasonable care to all who may lawfully come on board, such duty presupposes that he is in control.

5. "We can find no decision in which such a lien has been imposed on a ship for the fault of another person other than the owner, when that fault is not that of a 'bare-boat' charterer, or of some specified class of persons like a compulsory pilot."

6. "Perhaps it may turn out in the end that the Supreme Court will hold that, though there be no warranty of seaworthiness, the fault of a repairman will establish a maritime lien against a ship because she has not furnished a safe place for shoreworkers; but nothing of the sort has ever as yet been decided, and as we have said, the doctrine of the ship as a jural entity is not one to be extended."

Reasons for Granting the Writ

I

The decision below should be reviewed because it is erroneous in its fundamental concept of the maritime law. It has tremendously important effects which will be involved in the future decisions of many—very many—other

cases. It is based on the concept that there is no warranty of seaworthiness at all running in favor of a shore based employee of a repair contractor engaged in reactivation repairs and that in the absence of a warranty of seaworthiness, there can be no liability imposed on the vessel *in rem* or her owner regardless of the gravity of the tortious maintenance and operation of a vessel unless the owner or a bare-boat charterer is in control of the ship.

An examination and comparison of the decision herein and the decision of the Court of Appeals for the second circuit decided about one month earlier, but by an entirely different panel of judges, each panel endeavoring to conform its decision to the decision of this Court in *West* v. *United States*, 361 U. S. 118, 80 S. Ct. 189, will demonstrate that the language used by this Court in that case, unnecessary to the decision therein, has been construed in such manner as to make the basic ground of decision in both cases completely lacking in logic, common sense and supporting precedent, although they reached opposite results.

In *Laudor* v. *Socony Vacuum Oil Company*, 275 Fed. 2d 599, decided by the Court of Appeals for the second circuit on March 8, 1960, the vessel, during lay-up, was having extensive repairs made during annual overhaul. The shipyard's supervisor sued for injuries sustained when a ladder which had been placed by another employee of the Bethlehem Steel Company slipped because it had not been tied. The vessel had a full crew aboard. The portion of the vessel under repair including the placing of the ladder involved was under the control of the Bethlehem Steel Company. Judge Medina, who wrote the unanimous decision said:

> "West (West v. U. S., 361 U. S. 118) however, makes it clear that, at least in some cases, control of the vessel is a decisive factor, for there it said:
>
> 'Petitioner overlooks that here the respondent had no control over the vessel or power either to

supervise or to control the repair work on which petitioner was engaged. We believe this decisive against both aspects of plaintiff's dual theory.' (Negligence and unseaworthiness.)

"Thus we must grope for some rational basis for deciding this case, * * *."

The court concluded that, although the making of the repair and the area of repair was in the control of the repair contractor, since there was a full crew aboard and the "shipowner had general control of the vessel" there was a warranty of seaworthiness.

In the decision in the instant case Judge Learned Hand wrote the opinion of the court and reached the opposite result, although there were sixteen "crew" members aboard the vessel, upon a finding made by the District Court that the vessel was under the control of the repair contractor.

It is thus plain that the decisive factor between the two decisions is the difference between (a) an owner in "general control" with the particular area "controlled" by the repairman, coupled with negligence in the course of making the repairs (Judge Medina says there is liability), and (b) an owner in possession with sixteen employees aboard, with the "control" of the vessel in the repair contractor and the negligence in the general maintenance of the vessel. (Judge Hand says there is no liability.)

It is difficult to conceive that such an irrational basis, unfounded in any precedent unless *West* v. *United States* (*supra*), supports the decisions, should be the basis of decision of similar cases in the future, including the instant case.

It is further difficult to conceive that such confusion should emanate from a decision of this court involving the simple question as to whether there is a warranty of

seaworthiness as to a condition of a vessel which the repairman had been expressly employed to make seaworthy. (In *West* v. *U. S.*, the injury resulted from a loose plug in the water line which was expressly listed for repair.)

See:

Filipek v. *Moore-McCormack Lines*, 2d Cir., 258 F. 2d 734.

II

In *Kemarec* v. *Compagnie Generale Transatlantique*, 358 U. S. 625, this court held that although there was no warranty of seaworthiness of a vessel to a visitor the ship owner owed a duty of exercising reasonable care towards those lawfully aboard the vessel who are not members of the crew, citing:

Leathers v. *Blessing*, 105 U. S. 626, 26 L. Ed. 1192;
The Max Morris, 137 U. S. 1, 11 S. Ct. 29, 34 L. Ed. 586;
The Admiral Peoples, 295 U. S. 649, 55 S. Ct. 885, 79 L. Ed. 1633.

Two of those citations were action *in rem*.

The cited cases are authority for the proposition that the duty of a ship to any person injured thereon is as broad as the duty of the owner to the injured person and that actions *in rem* will lie for the violation of any such duty.

See also:

The Waco, 3 Fed. 2d 476, 478;
The Osceola, 189 U. S. 158;
Mitchell v. *Trawler Racer, Inc.*, 80 S. Ct. 926, U. S. ——.

The decision in the case *sub judice* recognizes the liability of a vessel *in rem* for the negligence of a demise

charterer to whom not only control of the vessel is entrusted by the owner but also to whom possession is delivered.

Now the Court of Appeals has decided in this case that there is no liability on the part of a ship *in rem* for negligence on the part of persons to whom control only is surrendered.

Expressed differently, in this case the Court of Appeals recognizes the fact that an owner of a ship may not absolve the vessel *in rem* from liability for the negligence of a demise charterer to whom possession and control has been surrendered, but it may absolve the vessel from such *in rem* liability by hiring independent contractors to operate the vessel for the owner, in which event the vessel is not liable *in rem* to anyone for any negligence. This is not possible under our maritime law.

Seas Shipping Co. v. *Sieracki*, 328 U. S. 85, 92.

III

The decision of the Court of Appeals misconstrues the basic duties which a vessel owes to persons aboard her.

The basic principles on which liability are imposed, aside from maintenance and cure for crew members, are most frequently expressed as:

1. Unseaworthiness.
2. Duty to furnish a safe place to work.
3. Negligence.

The opinion treats an owner's duty with respect to seaworthiness as an "absolute duty imposed regardless of fault." With this statement as a definition of a "warranty of seaworthiness", we have no quarrel. All too frequently, as in the instant case, the courts construe the

owner's duty with respect to unseaworthiness as embracing only those cases where the unseaworthiness is caused "without fault". Not until *Seas Shipping Co. Inc.* v. *Sieracki*, 328 U. S. 85, was it held that a ship owner was liable to a shore worker injured through unseaworthiness which existed without fault on the part of the owner. But unseaworthiness resulting from negligence had long before been recognized as the basis of liability to a shore based worker on the part of the ship and her owner.

See cases cited in *Pope & Talbot* v. *Hawn*, 346 U. S. 406, 413, note 6.

In *Mitchell* v. *Trawler Racer, Inc.*, —— U. S. ——, 80 S. Ct. 926, 930, this court pointed out that during the 19th century, "the decisions of that era for the most part treated maritime injury cases on the same footing as cases involving the duty of a shoreside employer to exercise ordinary care to provide his employees with a reasonably safe place to work." This Court further stated:

> "In the present posture this case thus presents the single issue whether with respect to so-called 'transitory' unseaworthiness the shipowner's liability is limited by concepts of common-law negligence."

In the instant case the Court of Appeals distinguishes its own decision in *Grillea* v. *United States*, 232 Fed. 2d 919, by saying that its decision therein "merely held that a longshoreman might sue a ship *in rem* if he was injured by her unseaworthiness, which no one denies". In other words it says that Grillea could recover because he was in that class of persons embraced within the circle of those as to whom there was a "warranty", but it overlooks the fact that in that case as in the instant case negligence caused the unseaworthiness and when negligence causes an unseaworthy condition liability exists *in rem* as to anyone injured as a result thereof without reliance on any warranty and regardless of whose negligence

caused the unseaworthiness. Whether the injured person be a passenger or a visitor to whom no warranty extends, unseaworthiness resulting from negligence gives rise to liability on the part of the vessel and the vessel may not escape liability in an *in rem* action by asserting that the negligence which caused the injury was the negligence of a person to whom the vessel owner had delegated his duty of exercising the required degree of care due to the person injured.

Pope & Talbot, Inc. v. *Hawn*, 346 U. S. 406, 413 and cases cited under note 6;
Crumady v. *The Joachim Hendrik Fisser*, 358 U. S. 423, 427;
Restatement of the Law, Agency 2d Sec. 492;
Bassett v. *New York, Chicago & St. Louis R. R. Co.*, 235 F. 2d 900;
The Waco, 3 Fed. 2d 476.

IV

The second most common basis for imposing liability on a vessel and her owner is the duty of the vessel and her owner to furnish persons invited aboard with a safe place to work. That duty has been repeatedly held to be non-delegable. This does not mean that the burden may not be delegated. It simply means that whether the duty is delegated or not makes absolutely no difference in the liability of the ship and her owner. The decision of the Court of Appeals that such duty exists on the part of the ship and her owner only when the owner retains "control" is in direct violation of that duty as frequently stated to exist.

V

In *Elijah Reed* v. *The S S Yaka & Pan Atlantic Steamship Corporation*, 183 Fed. Sup. 69 (Eastern District of Pennsylvania) decided April 29, 1960, amended May 4,

1960, the S S Yaka was under a demise charter to Pan Atlantic S. S. Corporation which directly employed libelant as a stevedore aboard the vessel. Libel was filed *in rem* for injuries sustained when libelant fell through a defective pallet while the demise charterer, doing its own stevedoring, was loading the vessel. The Court said in part:

> "We turn then to the second question of law in this case, which both parties agree has never been decided in the Third Circuit. The question, simply stated is: May a stevedore employed by a bare boat charterer maintain an action *in rem* against the vessel to recover damages for personal injuries caused by unseaworthiness which arose after the ship was surrendered to the bare boat charterer.
>
> * * * * * *
>
> Moreover the question of operation and control of the ship would appear to have no real significance in an *in rem* action for unseaworthiness, since unseaworthiness is not based on negligence or any wrongful act."

The court allowed a recovery against the vessel with right of indemnity against the employer—demise charterer.

VI

The decision of the Court of Appeals in the instant case completely misconstrued the decision of this Court in *West* v. *United States*, 361 U. S. 118. While there is a similarity in the status of the MARY AUSTIN in that case and the ROBERT FULTON in this case, in that they were both vessels undergoing reactivation repairs after having been laid up in the "month-ball" fleet, the similarity ends there.

In the *West* case the workman was injured by a loose plug in the water line, an item specifically listed for repairs. Certainly there could be no warranty or seaworthiness or duty to furnish a safe place to work with respect to the condition which the repairman was employed to correct.

In the *West* case this Court said in part:

> "Of course, one aspect of the shipowner's duty to refrain from negligent conduct is embodied in his duty to exercise reasonable care to furnish a safe place to work.
>
> * * * * * * *
>
> There was no hidden defect in the water system. It was one of the objects to be repaired and its plugs were to be replaced where necessary. * * * It appears manifestly unfair to apply the requirement of a safe place to work to the shipowner when he has no control over the ship or the repairs, and the work of repair in effect creates the danger which makes the place unsafe. The respondent * * * was under no duty to protect petitioner from risks that were inherent in the carrying out of the contract.
>
> * * * * * * *
>
> While there might be instances of hidden or inherent defects, sometimes called 'latent' that would make the owner guilty of negligence, even though he had no control of the repairs, we hold that under the circumstances here the shipowner could not be charged."

In the instant case some one had removed two hatch boards and had then pulled the tarpaulin over the aperture. The hatch was covered and the tarpaulin was on because it had rained that day. There was no connection whatever between the condition causing the injury and the making of the repairs.

VII

The Court of Appeals was clearly in error in holding that the following finding of the District Court was not clearly erroneous:

> "Although at the time of and during the day preceding the accident employees of the respondent were

aboard the vessel it was the function of such persons only to inspect completed repairs made by Todd to determine that they were made in accordance with the contract. During the course of the repair work the hatches were continually being opened and closed by Todd's employees, and only by Todd's employees, to permit Todd to perform various phases of its work."

There is not an iota of testimony to support that finding. On the contrary the proof shows that on the day of the accident, November 23, 1951 (Friday night at 11 P. M.), the work on the vessel which had been in progress for a month, was within one working day of completion. On November 23, 1951, there were sixteen "crew" members aboard the vessel from master to wiper, the owner maintained a gangway watch to prevent unauthorized persons from going aboard (59a, 60a)*, sixty laborers from "Atlantic" working under the direction of the mate bringing on stores, cleaning holds, acting as watchmen, etc., and there was a third gang, number unstated, working under the direction of the Captain (70a)*.

These statements are not made on controverted testimony. They are based upon the testimony of the respondent's employees on the ship, from records made and produced by respondent.

Concededly there is no proof as to who actually pulled the tarpaulin over the aperture in the hatch.

For the court to hold that Todd and not the owner of the vessel was in "control of the vessel" is not a reliance on conjecture because conjecture would suggest that the mate or some of his laborers, in making inspections or putting equipment into the hold had left the opening and then covered it with a tarpaulin.

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* References are to appendix to appellant's brief submitted to the Court of Appeals.

Such finding of control in Todd is based upon no evidence whatever and in direct contradiction of the uncontradicted evidence of respondent's witnesses, supported by the owner's records.

Such finding should have been reversed by the Court of Appeals.

McAllister v. *United States*, 348 U. S. 19, 20.

VIII

The questions presented in this case are of great and recurring significance in the administration of the maritime law.

Judge Learned Hand in his opinion in this case stated:

> "Perhaps it may turn out in the end that the Supreme Court will hold that, though there be no warranty of seaworthiness, the fault of a repairman will establish a maritime lien against a ship because she has not furnished a safe place for shoreworkers; but nothing of the sort has ever as yet been decided. * * *. (A. 23)

CONCLUSIONS

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion of United States Court of Appeals, Second Circuit:

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 232—October Term, 1959.

(Argued March 8, 1960. Decided April 11, 1960.)

Docket No. 25891

GEORGE LATUS,

Libellant-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee and Appellant,

TODD SHIPYARDS CORP.,

Respondent-Impleaded-Appellee.

Before:

LUMBARD, *Chief Judge,*
HAND and LEWIS, *Circuit Judges.*

Appeal from a decree in the admiralty of the District Court for the Eastern District of New York, ZAVATT, *J.*, presiding, dismissing a libel in *personam*, and *in rem*, to recover for personal injuries suffered by a painter on board a ship owned by the United States.

THOMAS A. MCDONALD, *for the appellant.*

ROBERT D. KLAGES, *for the appellee.*

PATRICK E. GIBBONS, *for impleaded-appellee.*

HAND, *Circuit Judge*:

The libellant appeals from a decree in the admiralty, 170 F. Supp. 837, dismissing his libel both *in personam* and *in rem* to recover damages for personal injuries when in the employ of the impleaded respondent, Todd Shipyards, while painting the respondent's ship "Robert Fulton." The facts were as follows. In September, 1947, the "Fulton" was withdrawn from navigation, dismantled, and laid up in the James River in the "mothball fleet." In October, 1951, it was decided to put her again into service, and she was towed to the Todd Shipyards under a contract by which that company agreed to make such repairs as were necessary to put her in commission. She lay at the shipyard until November 28 when, all the required work having been completed, a temporary Certificate of Safety was issued to her. Her crew had already "signed on" the day before. On November 23, the libellant, a painter employed by the Shipyards Company under this contract had been engaged in painting the ship and walked over one of the hatches which was covered with a tarpaulin. The hatch cover had been taken out to allow entry to and from the hold and had not been replaced when the tarpaulin was spread over the hatch. The libellant stepped upon the tarpaulin where the hatch cover had been taken off and fell through to the hold, sustaining severe injuries. He sued the United States as owner and the United States impleaded the Shipyards Corporation. His position is twofold. He argues that the ship was liable *in rem* for failing to provide him with a safe place to work; and that he was covered by a warranty of seaworthiness. He advances two other reasons to sup-

port his recovery, but these we do not find it necessary to discuss independently of our consideration of the first two.

It is now authoritatively settled, if indeed it was ever in doubt, that, when a ship has been withdrawn from navigation and while she is being reconditioned, she does not warrant her seaworthiness to those who work aboard her until she returns to active service. *West* v. *United States*, 361 U. S. 118. Although the work that the libellant was doing was of a kind that would be done by the crew, when the ship is in commission, so that *Sea's Shipping Co.* v. *Sieracki*, 328 U. S. 85, would have applied, if she had been, we cannot agree with the libellant's argument that a ship is progressively returned to service as to those parts of her on which the necessary restoration had been done. The warranty of seaworthiness has never been divided into fragments; a ship is either fitted for her duties in all respects, or she is not fitted at all. This does not mean that before she is fit her owner may not be liable to those who come aboard because of his neglect to provide for their safety; but that is quite another matter from imposing upon him the conventional warranty of seaworthiness. There is not a syllable in the books to suggest that the warranty attaches seriatim as part by part is made ready for service. It would altogether ignore the historical origin of the doctrine to attempt to rationalize it in such a way. True, it has been much extended since *The Osceola*, 189 U. S. 158, but it has always retained the elements of its origin—an absolute duty imposed, regardless of fault, going back to archaistic notions of legal obligations and penalties imposed on inanimate objects, but retaining its vitality because of its contribution to modern notions of the distribution of loss among those who follow the sea. The fact that in the case at bar the master and some of the other officers were on board to inspect the progress of the work was immaterial. That was also true in *West* v. *United States*, *supra*, 123.

Next is the question whether the United States, as owner, was charged with the same duty to use reasonable care to

furnish the libellant with a safe place to work that attaches to an owner in whose premises work is being done by those employed thereon. Again, *West v. United States*, *supra*, provides the answer because the United States, as owner, "had no control over the vessel, or power either to supervise or to control the repair work in which the petitioner" (libellant) "was engaged." The libellant does indeed deny that the United States ever lost control of "The Fulton," and further asserts that, if it did, it had reasserted control before the libellant was injured; but the findings preclude either assumption. They are as follows. "In the instant case there is no evidence whatever that the respondent" (United States) "created the defective condition which caused the libellant's injuries. Control of the vessel and of the manner in which repairs were made rested with Todd. Although at the time of and during the day preceding the accident employees of the respondent were aboard the vessel, it was the function of such persons only to inspect completed repairs made by Todd to determine that they were made in accordance with the requirements of the contract. During the course of repair work the hatches were continually being opened and closed by Todd's employees, and only by Todd's employees, to permit Todd to perform various phases of its work." Certainly the finding we have just quoted was not "clearly erroneous." Although we recognize that a shipowner in possession owes the personal duty of reasonable care to all who may lawfully come on board, *Kermarec v. Compagnie Generale Transatlantique*, 358 U. S. 625, such a duty presupposes that he is in control.

The libellant's final position that, even if the United States was under no personal duty to use such reasonable care, in any event a liability *in rem* arose independently. There are of course such duties known to the maritime law, the best known of which is the liability of a ship for the negligence of a compulsory pilot, *The China*, 7 Wallace 53. It is also true that when a ship is on "bare-boat" charter, negligence of the crew "appointed and paid by the char-

terers" will charge the ship *in rem*. *The Barnstable*, 181 U. S. 464. In the case at bar Todd Shipyards was not such a charterer, or indeed a charterer at all. Like the owner's warranty of seaworthiness, an implied liability *in rem*, regardless of any personal duty of the owner, is a fiction, reaching far back into the early history of the law; and as has been often quoted, "a fiction is not a satisfactory ground for taking one man's property to satisfy another man's wrong." *The Eugene F. Moran*, 212 U. S. 466, 474. We can find no decision in which such a lien has been imposed on a ship for the fault of another person than the owner, when that fault is not that of a "bare-boat" charterer, or of some specified class of person like a compulsory pilot. *Hercules Co.* v. *The Brigadier General Absolam Baird*, 214 Fed. (2) 66 (C. A. 3), was a suit to recover for repairs under § 972 of Title 46; it has no relevancy to the case at bar. *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U. S. 124, did not concern any right *in rem*. In *Crumady* v. *The Joa[illegible] Hendrick Fisser*, 358 U. S. 423, a stevedore's employee sued the ship *in rem* as unseaworthy and had recovered; and the shipowner sued the libellant's employer for its negligence. The original recovery was under the doctrine of *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, and the owner's recovery was upon the fault of the stevedore's employer. That is irrelevant as to whether the libellant himself had a claim *in rem* against a ship, independently of any warranty. *Grillea* v. *United States*, 232 Fed. (2) 919 (C. A. 2) merely held that a longshoreman might sue a ship *in rem* if he was injured by her unseaworthiness, which no one denies. Perhaps it may turn out in the end that the Supreme Court will hold that, though there be no warranty of seaworthiness, the fault of a repairman will establish a maritime lien against a ship because she has not furnished a safe place for shoreworkers; but nothing of the sort has ever as yet been decided, and, as we have said, the doctrine of the ship as a jural entity is not one to be expanded.

Decree affirmed.

Judgment.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of April, one thousand nine hundred and sixty.

Present: HON. J. EDWARD LUMBARD, Chief Judge.
HON. LEARNED HAND,
HON. DAVID T. LEWIS, Circuit Judges.

GEORGE LATUS,

Libelant-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellant,

and

TODD SHIPYARDS CORP.,

Respondent-Impleaded-Appellee.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed; with costs to the respondent-appellant and respondent-impleaded-Appellee.

A. DANIEL FUSARO,
Clerk.

Order Denying Petition for Rehearing.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the second day of May, one thousand nine hundred and sixty.

Present: HON. J. EDWARD LUMBARD, Chief Judge.
HON. LEARNED HAND,
HON. DAVID T. LEWIS, Circuit Judges.

GEORGE LATUS,

Libellant-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellant,

and

TODD SHIPYARDS CORP.,

Respondent-Impleaded-Appellee.

A petition for a rehearing having been filed herein by counsel for the libellant-appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk.